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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 893

McCROSKEY & Co., Inc., *Petitioner*,

v.

N. L. WILLARD and GEORGE L. STARR,
Receivers of Kennel & Co., Inc., *Debtor*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No.

McCLOSKEY & Co., INC., *Petitioner*,

v.

N. L. WYMARD and GEORGE L. STARK,
Receivers of Kemmel & Co., Inc., Debtor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

McCLOSKEY & Co., INC., your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on March 11, 1965.

OPINIONS BELOW

The opinion of the court below (Appendix A, *infra*, pp. A-1-A18) is reported at 342 F. 2d 495. The first opinion of the district court on the merits (R. 655a-666a)* is re-

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* The printed record consists of the two volumes of Appendix for Appellant filed at the original hearing below (pp. 1a-668a), the Appendix upon Rehearing (pp. 1aa-3aa), and the Appendix upon Remand Certification (pp. 1bb-38bb). All will be referred to as "R."

ported at 217 F. Supp. 143. The opinions of the district court following remand by the court below (R. 32bb-38bb) are reported at 234 F. Supp. 706. The opinions rendered in connection with petitioner's application for a stay are reported at 190 F. Supp. 420 and 292 F. 2d 839.

JURISDICTION

The judgment of the court below (Appendix B, *infra*, p. A19) was entered on March 11, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether consent can properly be inferred in a situation where the facts demonstrate the absence of conscious choice.

2. Whether acquiescence in and admission of allegations of diversity jurisdiction which, unbeknownst both to the parties and to the district judge, were insufficient under 28 U.S.C. § 1332(c) as amended, is equivalent to consent to suit in Federal court under the provisions of § 23(b) of the Bankruptcy Act, 11 U.S.C. § 46(b).

3. Receivers in bankruptcy brought suit in a United States district court against a corporation on their corporate debtor's claim, asserting jurisdiction based on diversity of citizenship without reference to the Bankruptcy Act. The defendant unsuccessfully sought a stay, then counterclaimed, but at all times admitted the existence of diversity jurisdiction. Judgment on the merits was rendered in favor of the receivers, with findings and conclusions establishing the presence of diversity jurisdiction. On appeal, the court of appeals remanded with directions to determine the existence of diversity in the light of the 1958 amendment to 28 U.S.C. § 1332(c) that for purposes of diversity jurisdiction declared corporations be citizens both of the state where their principal place of business was located as well as of the state where they were in-

corporated. It then appeared that the debtor and the defendant both had their principal place of business in the same state, negativing diversity jurisdiction.

The question presented, on which the court below en banc divided sharply, 5 to 3, with two separate majority opinions, is whether in those circumstances the corporate defendant can be said to have consented to suit in Federal court under § 23(b) of the Bankruptcy Act, 11 U.S.C. § 46(b).

STATUTES AND RULE OF COURT INVOLVED

1. Section 2(a)(7) of the Bankruptcy Act as amended, 11 U.S.C. § 11(a)(7), provides as follows:

> "SEC. 2. CREATION OF COURTS OF BANKRUPTCY AND THEIR JURISDICTION.
>
> "a. The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this title, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to—
>
> • • • • •
>
> "(7) Cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided, and determine and liquidate all inchoate or vested interests of the bankrupt's spouse in the property of any estate whenever, under the applicable laws of the State, creditors are empowered to compel such spouse to accept a money satisfaction for such interest; and where in a controversy arising in a proceeding under this title an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy, by answer or motion filed before the expiration of the time prescribed by law

or rule of court or fixed or extended by order of court for the filing of an answer to the petition, motion or other pleading to which he is adverse, he shall be deemed to have consented to such jurisdiction; * * *."

2. Section 23(b) of the Bankruptcy Act as amended, 11 U.S.C. § 46(b), provides in pertinent part as follows:

"SEC. 23. JURISDICTION OF UNITED STATES AND STATE COURTS.

* * * * *

"b. Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this title had not been instituted, unless by consent of the defendant, * * *."

3. Sections 1332(a) and (c) of Title 28, U.S.C., as amended in 1958, provides as follows:

"**§ 1332. Diversity of citizenship; amount in controversy; costs**

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

"(1) citizens of different States;

"(2) citizens of a State, and foreign states or citizens or subjects thereof; and

"(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

* * * * *

"(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: *Provided further,* That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to

which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business."

4. Rule 8(a), F.R. Civ. P., provides as follows:

"Rule 8. General Rules of Pleading

"(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded."

STATEMENT

This was a plenary action brought in the Federal court for eastern Pennsylvania by the bankruptcy receivers of a painting contractor, Kemmel & Co., Inc., hereinafter "Kemmel." The action sought compensation in the amount of over $418,000 from the general contractor, McCloskey & Co., Inc., hereinafter "McCloskey," for work originally undertaken at a fixed price of $290,000 under a detailed written contract, but allegedly completed under a subsequent oral agreement that the entire job should be paid for on a cost plus basis. On the merits the receivers recovered a judgment for $271,346.37 (R. 666a), which on appeal was reduced by $78,843.44 representing an item for overhead (*infra*, pp. A7, A18, A19).

The merits are no longer in question; only the jurisdiction of the district court is now in issue; the statement that follows is limited accordingly.

The jurisdictional averments of the receivers' complaint were as follows (R. 6a):

> "1. N. L. WYMARD and GEORGE L. STARK were, by Order of this Court, dated March 2, 1960, appointed receivers of KEMMEL & Co., INC., Debtor Plaintiff in the above entitled matter and have duly qualified and are now acting in such capacity as receivers.
>
> "2. On May 2, 1960 Plaintiffs obtained an Order of the Referee in Bankruptcy permitting them to sue the above named McCLOSKEY & Co., INC., Defendant, by reason of the facts more fully set forth herein.
>
> "3. Plaintiff is a corporation incorporated and existing under the laws of the Commonwealth of Pennsylvania. Defendant is a corporation incorporated under the laws of the State of Delaware. The matter in controversy exceeds, exclusive of interests and costs, the sum of $10,000."

McCloskey moved to stay proceedings pending arbitration, on the ground that Kemmel had by agreement precluded itself from litigating the claim in suit until a pending arbitration was resolved. This motion was denied (R. 1a-2a; 190 F. Supp. 420 (E.D. Pa.), affirmed, 292 F. 2d 839 (C.A. 3)), and McCloskey thereupon answered the receivers' jurisdictional allegations quoted immediately above by admitting all of them (R. 36a-37a).

As a fourth defense, McCloskey sought affirmative relief by way of counterclaim, seeking nearly $250,000 in respect of an alleged loan to Kemmel (R. 47a-49a).

Following a trial on the merits, the district court made the following findings of fact respecting jurisdiction (R. 655a):

> "1. Kemmel is a painting contractor incorporated and existing under the laws of the Commonwealth of Pennsylvania.
>
> "2. McCloskey is a general contractor incorporated under the laws of the State of Delaware."

It also made this jurisdictional conclusion of law (R. 666a):

> "1. We have jurisdiction of the parties and the subject matter."

When McCloskey appealed (R. 668a), court below on its own motion raised the issue of jurisdiction, and on June 18, 1964, vacated the judgment below with directions to give the receivers leave to amend; its order was in these terms (R. 2aa):

> "It is ORDERED that the judgment of the District Court be and it hereby is vacated, with instructions to grant the plaintiffs leave to amend their complaint so that it will properly allege its jurisdictional basis, in accordance with Rule 8 of the Federal Rules of Civil Procedure, whether jurisdiction be based on the Bankruptcy Act or an diversity of citizenship, or both, bearing in mind that an allegation of the principal place of business of a corporate party is an essential part of a proper pleading of diversity jurisdiction."

Thereupon a motion for rehearing en banc was granted (R. 3aa), following which the earlier order of remand was vacated, and a new order entered, as follows (R. 1bb-2bb):

> "It is further ORDERED that the cause in the above entitled case be and it hereby is remanded to the District Court with leave to the plaintiffs to apply to that Court for leave to amend their complaint in the case of N. L. Wymard and George L. Stark, Receivers of Kemmel & Co., Inc. vs. McCloskey & Co., Inc., Civil No. 28147, so as to properly allege its jurisdictional basis, whether it be based on diversity of citizenship, or bankruptcy, or both, bearing in mind that an allegation of the principal place of business of a corporate party is an essential part of a proper pleading of diversity jurisdiction;
>
> "It is further ORDERED that the District Court certify to this Court as a supplement to the record on appeal all proceedings subsequent to this order, including inter alia, plaintiff's petition to amend, the

answer, the District Court's order on the petition, and if granted, the District Court's order and opinion with respect to its own jurisdiction of the amended complaint;

"It is further ORDERED that the cause be and it is retained as a pending appeal in this Court."

Following certain written objections by McCloskey (R. 1aa, 3bb), and a conference with the district judge in chambers (R. 4bb-30bb), the receivers formally elected not to amend in either respect suggested by the court of appeals (R. 31bb). The district court thereupon considered the jurisdictional issue pursuant to the order of remand, and concluded that "McCloskey waived its objection to the jurisdiction of the District Court and manifested its complete consent as required by Section 23(b) of the Bankruptcy Act" (R. 36bb); its new opinions (R. 32bb-38bb) were duly certified to the court of appeals.

That tribunal reheard the case en banc, divided 5 to 3 in affirming the judgment below as to jurisdiction (writing two opinions in the process), but agreed that the award in favor of the receivers must be reduced by $78,843.44.

Judge Hastie, writing for the court, noted that McCloskey had entered a general appearance, interposed objections, moved to stay proceedings, filed an answer and a counterclaim, and went to trial. He accordingly held that these acts constituted a manifestation of acquiescence that the controversy be adjudicated in the federal forum, the more so since the case had now been fully litigated. He said (*infra*, p. A5):

"Mere mistake or oversight as to the legal consequence of facts clearly alleged in the complaint does not vitiate such consent. Certainly, if the defendant had simply been unaware that section 23(b) existed, that would not have invalidated its consent. We think the additional legal mistake as to the existence of diversity jurisdiction had no greater effect."

Judge Freedman, concurring in an opinion in which each member of the majority also concurred, said (*infra*, pp. A7-A8, A9):

> "The question presented is a close and difficult one. Decisive for me, however, is the fact that in the present case a full trial has been held and a decision reached on the merits, including the defendant's counterclaim, all without any objection to the jurisdiction of the court.
>
> • • • • •
>
> "In the circumstances of the present case, therefore, I would hold that the defendant's conduct which culminated in a full adjudication of the merits of the controversy, constituted an acceptance of the jurisdiction of the Court which it is now too late to deny."

Judge Kalodner and two other judges dissented, on the ground that § 23(b) of the Bankruptcy Act was a limitation on the jurisdiction of Federal courts, which in the face of its provisions could only be created by consent. The heart of his dissent is in these passages (*infra*, pp. A17, A18):

> "It is obvious that one cannot *consent* to the jurisdictional premise of a suit of which he is *unaware*, and of which the prosecutor of the suit and the court which tries it are equally unaware. Section 23(b) certainly requires that the *consent* to jurisdiction be a *knowing consent* since the creation of jurisdiction is dependent on it.
>
> • • • • •
>
> "There was not even a 'pretense in this case' of *consent* to the suit within the meaning of Section 23(b) as construed by the Supreme Court."

REASONS FOR GRANTING THE WRIT

The apparent uniqueness of the facts just recited is deceptive, for actually the present case involves a principle of general application, one consistently ruled by this Court in many fields of law, but which the majority en banc below quite overlooked in its preoccupation with the details of the litigation.

"A waiver," this Court has often held (e.g., *Johnson* v. *Zerbst*, 304 U.S. 458, 464), "is ordinarily an intentional relinquishment of a known right or privilege." The heart of this case is that the majority below have spelled out a consent to be sued in Federal court under § 23(b) of the Bankruptcy Act in a situation where the undisputed facts negative any conscious choice on petitioner's part, since it, together with the respondents and the district court, believed that the allegations, admissions, findings, and conclusion of diversity jurisdiction established an independent and indeed unassailable ground of Federal jurisdiction.

First. Nothing here turns on verbal differences between "consent," "acquiescence," and "waiver"; pursuit of these and similar dialectical or lexicographical variants would plainly be unprofitable. It is similarly unhelpful to read into or out of § 23(b) of the Bankruptcy Act broad generalizations regarding the proper distribution of judicial power between Federal and State courts, for in both of the most recent leading cases construing that section there was lacking the allegation of diversity jurisdiction that creates the present problem. *Schumacher* v. *Beeler*, 293 U.S. 367, 370; *Williams* v. *Austrian*, 331 U.S. 643, 645. Accordingly, those decisions cast no light whatever on the issue that so sharply divided the court below.

Second. The basic question here is whether there can be a waiver, or a consent, or acquiescence, where the facts establish the absence of any conscious choice, for in this case the mutual and indeed triple mistake on the part of both parties plus the district court, of overlooking the limitations imposed in 1958 on corporate diversity jurisdiction, entirely negatived knowing consent to suit in Federal court under § 23(b) of the Bankruptcy Act—a jurisdiction that was neither alleged originally (R. 6a) nor supplied by amendment (R. 31bb) even after the court of appeals specifically suggested that precise additional allegation (R. 2aa, 1bb-2bb)—quite as much as the mutual

mistake of the parties over the identity of the ship *Peerless* negatived consent in the classic case of *Raffles* v. *Wichelhaus*, 2 Hurl. & C. 906.

Third. As this Court has said (*Green* v. *United States*, 355 U.S. 184, 191), "'Waiver' is a vague term used for a great variety of purposes, good and bad, in the law. In any normal sense, however, it connotes some kind of voluntary *knowing* relinquishment of a right." (We have italicized the word "knowing.") That test of waiver has been applied by this Court in litigation involving the National Labor Relations Board (*Labor Board* v. *Lion Oil Co.*, 352 U.S. 282, 293) and the Federal Trade Commission (*St. Regis Paper Co.* v. *United States*, 368 U.S. 208, 217), as well as in decisions dealing with such constitutional issues as due process of law, the privilege against self-incrimination, search and seizure, the right to counsel, and double jeopardy.

The requirements for a valid waiver, though uniformly applied, have been variously phrased. "Understandingly" was the word used in *Uveges* v. *Pennsylvania*, 335 U.S. 437, 441. "Unequivocally and intelligently" was twice employed, in *Quinn* v. *United States*, 349 U.S. 155, 164, and in *Emspak* v. *United States*, 349 U.S. 190, 195. Other variants met with in the books are "intelligently and understandingly" (*Herman* v. *Claudy*, 350 U.S. 116, 118; *Moore* v. *Michigan*, 355 U.S. 155, 161; *Carnley* v. *Cochran*, 369 U.S. 506, 516), "intelligent and competent" (*Johnson* v. *Zerbst*, 304 U.S. 458, 465), and "meaningful" (*Green* v. *United States*, 355 U.S. 184, 192; *Blackburn* v. *Alabama*, 361 U.S. 199, 211).

But at the heart of all these differently formulated wordings of the unquestioned standard is the indispensible element of conscious knowledge—"a known right or privilege" (*Johnson* v. *Zerbst*, 304 U.S. 458, 464); "voluntary knowing relinquishment of a right" (*Green* v. *United States*, 355 U.S. 184, 191), "understandingly and know-

ingly" (*Fay* v. *Noia*, 372 U.S. 391, 439), a "considered choice" (*ibid.*). For there can be no waiver "when the defendant does not know of his right" (*Gibbs* v. *Burke*, 337 U.S. 773, 780).

It is no answer to say, as the court did (*infra*, p. A5, quoted *supra*, at p. 8), that the situation is the same as if petitioner had been completely unaware of § 23(b). We can assume either petitioner's awareness of that provision or proceed on the footing that petitioner was chargeable therewith; the point here is that consideration of § 23(b) and of its consequences was in fact blocked from view by the assumption, which petitioner shared not only with the adverse party but with the district judge, that an unassailable basis of Federal jurisdiction because of diversity allowed no scope for, and precluded the operation of, § 23(b). Nor was this jointly shared assumption, as the court went on to say (*loc. cit.*), an "additional legal mistake." Under the 1958 amendment, diversity requires a factual determination regarding each corporation's principal place of business, a fact not in the record, and in respect of which the court of appeals remanded the case for factual determination (R. 2aa, 1bb-2bb, quoted *supra* at pp. 7-8).

Fourth. We do not here invoke the doctrine of the constitutional cases—citations are legion—that waiver of fundamental rights are not lightly to be inferred. We only assert that there must be a conscious waiver, a knowing act—which, very plainly, was wholly lacking here, where all concerned concurred in the sufficiency of the unchallenged averment of diversity jurisdiction, which established a basis for Federal jurisdiction quite independent of consent by the petitioner.

Inasmuch as a conscious, knowing choice constitutes the minimal requirement for any waiver under all of this Court's decisions, a requirement that was ignored by the majority en banc below, the decision sought to be reviewed

presents, not a peculiar or an unusual or a non-recurrent factual pattern, but rather the broad disregard of a general legal principle that this Court has consistently and indeed universally applied.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

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JUNE 1965.

APPENDIX A

Opinion Below

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14598

N. L. WYMARD AND GEORGE L. STARK, RECEIVERS OF KEMMEL & CO. INC., DEBTOR

v.

McCLOSKEY & CO., INC., *Appellant.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued June 18, 1964
Reargued September 17, 1964

Before: BIGGS, *Chief Judge;* and McLAUGHLIN, KALODNER, STALEY, HASTIE, GANEY, SMITH and FREEDMAN, *Circuit Judges.*

OPINION OF THE COURT
(Filed March 11, 1965)

By HASTIE, *Circuit Judge.*

This plenary action was instituted in the district court by the bankruptcy receivers of a painting contractor to recover agreed compensation for work, originally undertaken under a detailed written contract but allegedly completed under a subsequent agreement that the entire job should be paid for on a cost plus basis. The receivers recovered a judgment for $271,346.37 and the defendant appealed.

On first hearing, only the merits of the award were challenged by the appellant. However, this court on its own motion has inquired whether requisite federal jurisdiction is present, and that issue has now been fully presented and considered. We dispose of it first.

The averments relevant to jurisdiction appear as follows in the first three paragraphs of the complaint:

> "1. N. L. WYMARD and GEORGE L. STARK were, by Order of this Court, dated March 2, 1960, appointed receivers of KEMMEL & Co., INC., Debtor Plaintiff in the above entitled matter and have duly qualified and are now acting in such capacity as receivers.
>
> "2. On May 2, 1960 Plaintiffs obtained an Order of the Referee in Bankruptcy permitting them to sue the above named MCCLOSKEY & Co., INC., Defendant, by reason of the facts more fully set forth herein.
>
> "3. Plaintiff is a corporation incorporated and existing under the laws of the Commonwealth of Pennsylvania. Defendant is a corporation incorporated under the laws of the State of Delaware. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000."

Having determined that this is, as alleged, a suit by receivers of a Pennsylvania corporation against a Delaware corporation on a claim in excess of $10,000, the parties and the trial judge treated these facts as sufficient to create diversity jurisdiction. However, in determining whether diversity exists, the principal place of business of a corporation, as well as its place of incorporation, must now be treated as the corporate seat. 28 U.S.C., 1958 ed., § 1332(c). *Kelly* v. *United States Steel Corp.*, 3d Cir. 1960, 284 F.2d 850. The present complaint contains no allegation of the principal place of business of either corporate party.[1] And matter in the record at least suggests that the principal place of business of the defendant corporation is Pennsylvania, the very state in which the bankrupt is incorporated. Accordingly, we have given the plaintiff an

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[1] For an appropriate form of allegation, see 28 U.S.C.A., Fed. R. Civ. P., Rules 1 to 11, 1963 Supp. 20, Appendix of Forms, Form 2.

opportunity to amend its pleadings and supplement its proof in an attempt to satisfy the jurisdictional requirements of diversity, but the plaintiff has elected to stand on its original pleadings.

In these circumstances, the claim of diversity jurisdiction fails. In so holding, we observe that numbers of cases continue to come before us on appeal in which failure to allege and prove the principal place of business of a corporate party has caused the record to be insufficient to establish the existence of alleged diversity jurisdiction. Yet, absent federal jurisdiction, no judgment of a federal court can stand. It is the continuing responsibility of trial counsel and trial courts to see that all essential jurisdictional facts are alleged and adequately established in the record.

Although the parties and the court below viewed this as a diversity case, the quoted language of the complaint discloses another possible basis of jurisdiction. It is alleged and admitted that the plaintiffs are receivers in bankruptcy authorized by a referee in bankruptcy to sue the defendant on a contract claim of the debtor. Aware of these circumstances, the defendant entered a general appearance and interposed defenses. First, it unsuccessfully moved to stay the proceedings to permit arbitration. Thereafter, it filed an answer and a counterclaim and went to trial on the merits of the controversy. These circumstances, it is now contended, suffice to establish federal jurisdiction under the provisions of sections 2(a)(7) and 23(b) of the Bankruptcy Act. 11 U.S.C. §§ 11(a)(7), 46(b). It is not disputed that these sections, read together, confer upon district courts plenary jurisdiction over suits in which bankruptcy receivers seek to collect from third persons sums allegedly owed to the debtor when bankruptcy intervened, provided that such a suit must be brought in a court where the bankrupt might have sued the defendant unless the defendant shall consent to the receiver's suit. *Schu-*

macher v. *Beeler*, 1934, 293 U.S. 367; *Williams* v. *Austrian*, 1947, 331 U.S. 642, 652. Obviously, the administration of bankruptcy and the adjudication of such suits as may be required for the collection and distribution of bankrupt estates are matters within federal power and primary federal responsibility in our constitutional scheme. Thus, Congress might have subjected a bankrupt's debtor to such a suit as this without regard to federal jurisdiction over a similar suit by the bankrupt before bankruptcy. However, as a matter of policy, Congress so framed section 23(b) as to enable a defendant to avoid a plenary suit by a receiver in any federal court in which the bankrupt himself could not have sued that defendant. Viewing this as a limitation of grace upon the normal reach of federal jurisdiction, the courts have consistently held that a defendant's consent to be sued where the debtor could not have sued him need not be express. Rather, submission by the defendant to the jurisdiction of the court without asserting any objection predicated upon section 23(b) is deemed a sufficient consent within the meaning of that section. *Gins* v. *Mauser Plumbing Supply Co.*, 2d Cir. 1945, 148 F.2d 974 (filing answer); *Detroit Trust Co.* v. *Pontiac Savings Bank*, 6th Cir. 1912, 196 Fed. 29, *aff'd.* 237 U.S. 186 (filing answer); *McEldowney* v. *Card*, C.C.E.D.Tenn. 1911, 193 Fed. 475 (answer, set-off and trial).

In this case, the defendant's appearance, its answer and, most strikingly, its affirmative request for relief by way of counterclaim, were manifestations of acquiescence that this controversy be adjudicated in the federal forum. The defendant's motion for a stay pending arbitration, which was ultimately denied, *Wymard* v. *McCloskey & Co.*, E.D.Pa. 1960, 190 F. Supp. 420, *aff'd per curiam*, 3d Cir. 1961, 292 F.2d 839, was not inconsistent with this acquiescence. Presupposing federal jurisdiction, it merely invoked federal authority to hold litigation in abeyance to permit resort to an allegedly agreed administrative procedure.

Nevertheless, the defendant urges that its conduct in litigating this case to final judgment on the merits without objection to the exercise of jurisdiction should not be viewed as voluntary submission to a plenary suit under the Bankruptcy Act because it thought that this was a proper diversity suit to which it could not interpose any valid objection. However, the averments in the opening paragraphs of the complaint asserted facts enough to disclose that jurisdiction could be exercised under the Bankruptcy Act, unless consent should be withheld under section 23(b). And the additional allegations of the complaint concerning diversity jurisdiction were insufficient on their face. What happened was that the defendant, misled by a mistaken view of the legal sufficiency of the complaint under one branch of federal jurisdiction and overlooking its sufficiency under another, consented to litigation in the federal forum. Mere mistake or oversight as to the legal consequence of facts clearly alleged in the complaint does not vitiate such consent. Certainly, if the defendant had simply been unaware that section 23(b) existed, that would not have invalidated its consent. We think the additional legal mistake as to the existence of diversity jurisdiction had no greater effect. And since the plaintiff perpetrated no fraud, the fact that it made the same mistake of law does not alter the situation. *Cf. McEldowney* v. *Card, supra.*

One other observation seems pertinent. No significant interest is sacrificed and no injustice is done by treating the defendant's conduct as requisite consent to the federal forum. The controversy is within an area of federal power and primary federal concern. The defendant has availed itself of the opportunity to present its case, both defense and counterclaim, in the federal forum and the matter has proceeded to final judgment. Certainly, a judgment for the defendant, on claim or counterclaim, would have been binding upon the plaintiff. It would serve no worthwhile purpose to permit the unsuccessful defendant now to avoid the outcome of this fully litigated case.

We come now to the merits of the case. McCloskey and Co., a general contractor, has obligated itself to construct some 1000 housing units at Fort Meade, Maryland. By formal agreeemnt it subcontracted the painting work to Kemmel and Co. Serious difficulties and delays, not chargeable to Kemmel, greatly increased the amount and cost of the painting work. The court below found that during the progress of the job McCloskey and Kemmel orally substituted for their original contract an agreement that Kemmel would do whatever painting was required and be reimbursed for all of his work on a "cost plus" basis. We think the evidence was sufficient to support this finding and that the authority of McCloskey's representatives who so agreed was sufficiently established.

However, the cost plus contract was not detailed. The court found merely an oral agreement in the most general terms that "all painting work performed by Kemmel be paid for on a 'cost plus' basis". To establish the amount of their claim at trial, Kemmel's receivers undertook to prove charges in various categories thought to be allowable under such an agreement. Labor costs, material costs, expenditures for taxes and workmen's compensation and other cost items directly allocable to this job were proved and allowed. In addition, an amount equal to 15 per cent of the total labor cost was added to reimbursable costs as "overhead", which witnesses said was allowable under the custom of the trade in such cases. This overhead item, amounting to $78,843.44, was separate from and additional to a 10 per cent profit item.

On this appeal, McCloskey argues that the charge for overhead was not allowable, as a matter of law. We find merit in this contention.

The court below did not decide, and in the abence of certain findings it is difficult for us to decide, whether the law of Pennsylvania or the law of Maryland determines the proper interpretation of this oral agreement. Appar-

ently, though the record is not clear on this, both parties had their home offices and principal places of business in Pennsylvania and the original contract seems to have been negotiated and executed there. However, the contract concerned work to be done in Maryland, and there is a trial finding that the oral cost plus agreement was reached at the job site. But because we find no significant difference between Pennsylvania law and Maryland law on the question in controversy, the choice of law question need not be resolved.

In both states there are clear, authoritative decisions that an agreement in general terms to pay for a job on a cost plus basis does not impose an obligation to pay anything for general overhead, in addition to whatever percentage of cost may be allowed for profit. *House* v. *Fissell*, 1947, 188 Md. 160, 51 A.2d 669; *Lytle, Campbell & Co.* v. *Somers, Fitler & Todd Co.*, 1923, 276 Pa. 409, 120 Atl. 409. *Accord, Charles Elmer & Sons* v. *Kelly*, 5th Cir. 1920, 263 Fed. 687; *Denemark* v. *Ed B. Mooney, Inc.*, 1951, 218 Ark. 944, 237 S.W.2d 41. Yet, in this case there has been added to the total cost of labor allocable to this job, what was described in the testimony of the secretary-treasurer of the bankrupt as a charge "of fifteen per cent for overhead, plant equipment, supervision, etc." This was justified as being in accordance with the custom of the trade. But custom cannot prevail over a rule of law that such overhead charges, unless specified in the agreement, are not recoverable under a general promise to pay on a cost plus basis.

The judgment of the district court must be modified to exclude the item of $78,843.44 allowed for overhead. Otherwise, it will be affirmed. Neither party shall be allowed its costs as against the other.

FREEDMAN, *Circuit Judge*, concurring.

The question presented is a close and difficult one. Decisive for me, however, is the fact that in the present

case a full trial has been held and a decision reached on the merits, including the defendant's counterclaim, all without any objection to the jurisdiction of the court.

In contrast to diversity cases in which the consent of the parties and even of the court added cannot confer jurisdiction, proceedings for collection of the assets of a bankrupt estate are within the federal power but the extent of the exercise of this power is made dependent on the consent of the defendant. The strength of the dissenting view therefore lies in the incongruity of attributing to a defendant a consent which admittedly was never sought or intended, because the parties contemplated jurisdiction based on diversity. It is, however, a narrow notion which would restrict consent in every case to an intentional expression. By the doctrine of estoppel the result of a fictional consent has long been recognized whenever the circumstances are such that to claim a lack of consent would be inequitable.

What is involved here is not the allocation of power between federal and state sovereignties. It seems to me too artificial, therefore, to say that the so-called jurisdictional element—where authority rather than power is involved—requires the casting aside of a laborious process of factual decision in an adversary proceeding hotly contested by both parties, solely because it is brought to the attention of the parties that the jurisdiction which they had thought supported the adjudication of their controversy has evaporated even though the suit could be sustained if the defendant consented. The reality of the contest is for me stronger than a formal expression of consent at this late date.

The purpose of the statutory provision is to afford to a defendant sued by a bankruptcy receiver the choice of having the claim decided by the State or Federal courts. The defendant has the power of choice because Congress intended, as said in *Schumacher* v. *Beeler*, 293 U.S. 367,

374 (1934), that these controversies should be heard and determined in the State courts for the greater economy and convenience of litigants and witnesses, but saw no reason to deny the jurisdiction of the Federal courts if the defendant consented to be sued therein. The defendant here tried its case in the Federal court; it never sought a determination of the controversy in the State courts.[1] The reason why the defendant failed to channel the trial into the State courts is not of decisive significance. Error of fact or mistake of law by the defendant, or whatever else may have been the cause of its silence, has now produced the result that resort to the State courts at this time, far from being for the economy and convenience of the litigants and witnesses, or even of the defendant, would cast a double burden on all the parties to the litigation. Its only purpose would be to afford the defendant a chance to relitigate an issue that has been adversarily determined.

The dissenting view would approve the anomalous result that at this stage of a case such as this a plaintiff would be at the mercy of the defendant. For whenever, as here, the defendant had lost on the merits, he would decline to give express consent and thus defeat the judgment against him, yet, if he had won, he could express consent and thereby ratify the judgment.

In the circumstances of the present case, therefore, I would hold that the defendant's conduct which culminated in a full adjudication of the merits of the controversy, constituted an acceptance of the jurisdiction of the Court which it is now too late to deny.

I; therefore, concur in the judgment of the Court.

All members of the court who have joined in the majority opinion are also in accord with the views expressed in this concurring opinion.

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[1] Its effort to deflect the case to arbitration does not touch this point.

KALODNER, *Circuit Judge,* dissenting.

I would vacate the judgment of the District Court for the reason that it lacked jurisdiction to entertain this action.

I agree with the majority's view that "the claim of diversity jurisdiction fails" by reason of the fact that the pleadings fail to satisfy the requirements as to diversity jurisdiction.

I disagree, however, with its view that jurisdiction exists under the Bankruptcy Act by reason of the defendant's asserted "consent" to the institution and prosecution of the instant action.

Section 23(b) provides that suits must "be brought *only* in the courts where the *bankrupt* might have *brought or prosecuted them* if proceedings under this Act had not been instituted, *unless by consent of the defendant.* . . ." (emphasis supplied)

It is obvious from the Complaint that it premised the District Court's jurisdiction solely on the diversity of the citizenship of the bankrupt and the defendant.

That that is so is established by the fact that the Complaint, in compliance with the requirement of Rule 8(a) F.R.C.P., that a complaint "contain a short and plain statement of the grounds upon which the court's jurisdiction depends", alleged as follows in Paragraph 3:

> "3. Plaintiff is a corporation incorporated and existing under the laws of the Commonwealth of Pennsylvania. Defendant is a corporation incorporated under the laws of the State of Delaware. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000."

The majority agrees that "the parties and the court below viewed this as a diversity case". That the District

Court so viewed it is established by the fact that in its Findings of Fact[1] it specifically found:

> "1. Kemmel [the bankrupt] is a painting contractor incorporated and existing under the laws of the Commonwealth of Pennsylvania.
>
> "2. McCloskey is a general contractor incorporated under the laws of the State of Delaware."

The parties, plaintiffs and defendant alike, frankly admitted that they viewed this case as one in diversity when they first presented themselves for oral argument on this appeal. It was only *after* we had, *sua sponte,* then called attention to the fact that Para. 3 of the Complaint insufficiently pleaded diversity jurisdiction, in failing to allege that the defendant's "principal place of business" was in a state other than Pennsylvania, that the plaintiffs, at a later date, asserted that jurisdiction existed by reason of the defendant's "consent" to the institution and prosecution of this action.

The hard core of the majority's reasoning in subscribing to the plaintiffs' theory of "consent" jurisdiction is that the allegations in the complaint that the plaintiffs are receivers in bankruptcy, authorized by a referee to sue the defendant, sufficiently established jurisdiction below if the defendant "consented" to the action; "consent" need not be "express", and defendant "consented", when it appeared, answered and sought relief by way of counterclaim; and that the defendant's mistaken belief that the suit was properly grounded on diversity jurisdiction "does not vitiate such consent."

The majority's holding that "consent need not be express" is premised on its view that ". . . as a matter of policy Congress so framed section 23(b) as to enable a

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[1] The opinion of the District Court is reported at 217 F. Supp. 143 (E.D. Pa. 1963).

defendant *to avoid* a plenary suit by a receiver in any federal court in which the bankrupt himself could not have sued that defendant," and that "Viewing this *as a limitation of grace upon the normal reach of federal jurisdiction,* the courts have consistently held that a defendant's consent to be sued where the debtor could not have sued him need not be express", and "submission by the defendant to the jurisdiction of the court without asserting any objection predicated upon section 23(b) is deemed a sufficient consent within the meaning of that section." (emphasis supplied)

I disagree both with the view that Section 23(b) was designed by Congress to enable a defendant "to avoid" an action similar to the instant one, and as "a limitation of grace upon the normal reach of federal jurisdiction."

I also disagree with the majority's view, later discussed, that the defendant's submission to the jurisdiction of the court below "without asserting any objection predicated upon section 23(b) is deemed a sufficient consent within the meaning of that section". The cases which it cites in support are utterly inapposite.

First, as to the majority's view that Section 23(b) was designed as an escape hatch for defendants seeking "to avoid" submission to federal jurisdiction, and as "a limitation of grace upon the normal reach" of such jurisdiction:

The Supreme Court has time and again, since 1900, held to the contrary. It has ruled that Section 23(b) was designed *to limit* the jurisdiction of federal courts with respect to independent actions brought by bankruptcy trustees, and to leave their trial to the state courts. It has also explicitly ruled that absent diversity of citizenship between bankrupt and defendant in such actions, federal jurisdiction is created only by "the consent of the proposed defendant".

In the landmark case of Bardes v. First National Bank of Hawarden, Iowa, 178 U.S. 521 (1900) it was said at page 538:

> ". . . Congress, by the 2nd clause of § 23 of the present bankrupt act, appears to this court to have clearly manifested its intention that controversies, not strictly or properly part of the proceedings in bankruptcy, but *independent suits brought by the trustee in bankruptcy to assert a title to money or property as assets of the bankrupt* against strangers to those proceedings, *should not come within the jurisdiction of the district courts of the United States, 'unless by consent of the proposed defendant,' of which there is no pretense in this case.*" (emphasis supplied)

and at page 539:

> "'1st. *The provisions of the 2d clause of § 23 of the bankrupt act of 1898 control and limit the jurisdiction of all courts, including the several district courts of the United States,* over suits brought by trustees in bankruptcy to recover or collect debts due from third parties, or to set aside transfers of property to third parties, alleged to be fraudulent as against creditors, including payments in money or property to preferred creditors.
>
> "'2d. *The district court of the United States can, by the proposed defendants' consent, but not otherwise,* entertain jurisdiction over suits brought by trustees in bankruptcy to set aside fradulent transfers of money or property, made by the bankrupt to third parties before the institution of the proceedings in bankruptcy.'" (emphasis supplied)

In Bush v. Elliott, 202 U.S. 477, 479-80 (1906), the Court said:

> "The Bankruptcy Act of 1898, . . . was a radical departure from the act of 1867, in the evident purpose of

> Congress *to limit the jurisdiction of the United States courts in respect to controversies which did not come simply within the jurisdiction of the Federal courts as bankruptcy courts, and to preserve, to a greater extent than the former act, the jurisdiction of the state courts over actions which were not distinctly matters and proceedings in bankruptcy. . . . The intention of Congress to prevent actions not strictly proceedings in bankruptcy from coming within the jurisdiction of the United States Courts, except in certain cases, was enacted into law in the section of the statute [Section 23(b)] now under consideration.''* (emphasis supplied)

In Schumacher v. Beeler, 293 U.S. 367 (1934) the Court not only declared that Congress intended in Section 23(b) to limit the jurisdiction of the federal courts in independent actions brought by bankruptcy trustees and to leave their trial *''for the most part in the state courts''*, but emphasized that ''Congress prescribed in § 23b *the condition of consent* on the part of the defendant sued by the [bankruptcy] trustee'', and that ''Section 23b was thus in effect *a grant of jurisdiction subject to that consent.''* (emphasis supplied)

Said the Court at page 374:

> ''In enacting § 23 [in 1898] it was clearly the intent of the Congress that the federal courts should not have the unrestricted jurisdiction of suits between trustees in bankruptcy and adverse claimants which these courts had exercised under the broad provisions of § 2 of the Act of 1867. *The purpose was to leave such controversies to be heard and determined for the most part in the state courts 'to the greater economy and convenience of litigants and witnesses'.* But no reason appeared for a denial of jurisdiction to the federal court if the defendant, the adverse claimant, consented to be sued in that court. The Congress, by virtue of

its constitutional authority over bankruptcies, could confer or withhold jurisdiction to entertain such suits and could prescribe the condition upon which the federal courts should have jurisdiction. See *Sherman* v. *Bingham,* 21 Fed. Cas. (No. 12,762), 1270, 1272. Exercising that power, the *Congress prescribed in § 23b the condition of consent* on the part of the defendant sued by the trustee. *Section 23b was thus in effect a grant of jurisdiction subject to that condition.*" (emphasis supplied)

More recently, in Williams v. Austrian, 331 U.S. 642 (1947) the Court had occasion to note, in another context, that Section 23(b) "has, since its enactment in 1898, been viewed as *a sharp restriction upon the jurisdiction theretofore exercised by bankruptcy courts and as a strong preference for state courts.*" (emphasis supplied)

The sum of the foregoing is that absent diversity of citizenship between the bankrupt and the defendant, in an action within the purview of Section 23(b), federal jurisdiction is *created* only by "*consent of the defendant.*"

Under Section 23(b) there are only two jurisdictional grounds for plenary suits of the type here involved, namely, (1) diversity of citizenship between bankrupt and defendant, and (2) *consent* of the defendant.

As earlier stated Rule 8(a), F.R.C.P., requires that the complaint "contain a short and plain statement of the grounds upon which the court's jurisdiction depends".

Here the Complaint alleged only the diversity ground and not that of *consent.* The majority has properly rejected the diversity ground because it was not properly pleaded. Surely the total failure to plead the *consent* ground is as fatal as the inadequate pleading of the diversity ground. Bare as it was of "a short statement of the grounds upon which the court's jurisdiction depends", as required by

Rule 8(a), the Complaint should have been dismissed by the District Court for lack of jurisdiction at the very outset of this case.

The majority has relied on a number of lower federal court cases to support its view that the failure to plead *consent* jurisdiction in a complaint is not fatal, and that such jurisdiction is sufficiently established by the "submission[2] by the defendant to the jurisdiction of the court without asserting any objection predicated upon section 23(b)".

Independent of the circumstance that these cases are inapposite on their facts,[3] they lack precedential value for these two further salient reasons: first, most of them were decided *before* Rule 8(a) became effective on September 1, 1938, and second, those *later* decided do not afford the slightest indication that they consider the impact of the Rule.

The majority has here taken a position which presents an anomaly. It first holds that the failure of the Complaint

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[2] "Submission" by entering an appearance, filing an answer or trial on the merits.

[3] In Gins v. Mauser Plumbing Supply Co., 148 F. 2d 974 (2 Cir. 1945) there was no allegation in the complaint that jurisdiction existed by reason of diversity of citizenship between the bankrupt (the Court called attention to that fact in Note 5, page 977), and the defendant by answering was held to have consented to the court's jurisdiction.

In Detroit Trust Co. v. Pontiac Savings Bank, 196 Fed. 28 (6 Cir. 1912), aff'd 237 U.S. 186, where the defendant appeared generally and answered, the court held there was consent for that reason. There is no indication, however, that the complaint in that case premised jurisdiction on diversity of citizenship between the bankrupt and the defendant.

In McEldowney v. Card, 193 Fed. 475 (C.C.E.D. Tenn. 1911), the Court held that the defendant consented to its jurisdiction by reason of answer, set-off and trial. However, it is significant that in that case the Court expressly noted at page 477 of its opinion that *"Neither the citizenship nor residence of the bankrupt was, however, alleged."* (emphasis supplied)

to contain an "allegation of the principal place of business of either corporate party" is fatal to a claim of diversity jurisdiction. It then holds, in total disregard of Rule 8(a) that "the averments in the opening paragraphs of the complaint [that the plaintiffs are receivers authorized by a trustee in bankruptcy to sue the defendant] asserted facts enough to disclose that jurisdiction could be exercised under the Bankruptcy Act, unless *consent* should be withheld under section 23(b)."

I cannot discern in averments that receivers have been authorized by a bankruptcy referee to bring a suit even a glimmer of an intimation that jurisdiction is based on *consent.*

Assuming, arguendo, that a complaint is not required to state in terms that *consent* is the basis of jurisdiction it is settled that it must at least make such allegation as will put the defendant on notice that jurisdiction is based on his *consent.*

In Toledo Fence & Post Co. v. Lyons, 290 Fed. 637 (6 Cir. 1923), often cited for its holding that a defendant consents to jurisdiction when it answers "upon the merits", it was said (p. 6460):

> "The *consent* contemplated by section 23(b) would seem to be one given, at the earliest, after bankruptcy, so that it could be *intelligently* made with *specific reference to the suit* which the trustee was about to bring or had brought." (emphasis supplied)

It is obvious that one cannot *consent* to the jurisdictional premise of a suit of which he is *unaware,* and of which the prosecutor of the suit and the court which tries it are equally unaware. Section 23(b) certainly requires that the *consent* to jurisdiction be a *knowing consent* since the creation of jurisdiction is dependent on it.

Here the defendant submitted itself to the jurisdiction of the court in reliance on the allegation, in the Complaint, of diversity of citizenship between it and the bankrupt, albeit such diversity was insufficiently pleaded. The plaintiffs *admittedly* premised their allegation of jurisdiction solely on the diversity of citizenship between the bankrupt and the defendant and the court did likewise.

There was not even a "pretense in this case" of *consent* to the suit within the meaning of Section 23(b) as construed by the Supreme Court.

It is the settled rule that words used in a statute must be construed in accordance with their accepted sense and meaning. "Consent", as the term is used by laymen and the legal profession, is defined as "a rational and voluntary concurrence in an act or contract." Funk & Wagnalls, New Standard Dictionary of the English Language, 1942 ed. at page 561.

For the reasons stated I would vacate the judgment of the District Court because of its lack of jurisdiction to entertain this action.*

Circuit Judges Staley and Ganey join in this dissent.

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* Were we to reach the merits we would agree with the majority that the item of $78,843.44 overhead awarded in the District Court's judgment should be disallowed and that otherwise the judgment should be affirmed, with no costs to either party as against the other.

APPENDIX B

Judgment Below

UNITED STATES COURT OF APPEALS
FOT THE THIRD CIRCUIT

No. 14,598

N. L. WYMARD AND GEORGE L. STARK,
RECEIVERS OF KEMMEL & CO., INC.,

v.

McCLOSKEY & CO., INC., *Appellant*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: BIGGS, *Chief Judge*, and McLAUGHLIN, KALODNER, STALEY, HASTIE, GANEY, SMITH and FREEDMAN, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the District Court filed May 13, 1963 be, and the same is hereby modified to exclude the item of $78,843.44 allowed for overhead and, as so modified, is affirmed. Neither party shall be allowed its costs as against the other.

ATTEST:
IDA O. CRESKOFF
Clerk

March 11, 1965

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965.

No. 209.

McCLOSKEY & CO., INC.,

Petitioner,

v.

N. L. WYMARD and GEORGE L. STARK, RECEIVERS OF KEMMEL & CO., INC., Debtor,

Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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June 25, 1966.

Hennegan Printing Corp., *Appellate Printers*, Camden, N. J.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 203.

McCLOSKEY & CO., INC.,

Petitioner,

v.

N. L. WYMARD AND GEORGE L. STARK, RECEIVERS OF KEMMEL & CO., INC., DEBTOR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the District Court on the merits is reported at 217 F. Supp. 143. The opinion of the District Court upon the question of jurisdiction is reported at 234 F. Supp. 706.

The opinions of the Court of Appeals for the Third Circuit on the merits and on the question of jurisdiction (Appendix A of Petition) are reported at 342 F. 2d 495.

The prior opinions of both Courts rendered with respect to Petitioner's application for a stay are reported at 190 F. Supp. 420 and 292 F. 2d 839.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED.

In a plenary suit brought by receivers in bankruptcy in a United States District Court, do the acts of the defendant in filing an answer on the merits, a counterclaim demanding affirmative relief, a supplemental answer, pre-trial memoranda, attending pre-trial conferences and four days of trial on the merits, thereafter filing requests for findings of facts and conclusions of law, motions for directed verdicts and motion for a new trial, constitute consent to the jurisdiction of that Court within the meaning of §23(b) of the Bankruptcy Act, 11 U. S. C. 46(b)?

STATUTES INVOLVED.

The pertinent provisions of the Bankruptcy Act—§2(a)(7), 11 U. S. C. §11(a)(7) and §23(b), 11 U. S. C. §46(b)—are set forth in the Petition at pp. 3-4.

In addition, further pertinent to the issue before this Court is §1334 of the Judicial Code of 1948, 28 U. S. C. §1334, which provides:

> "The district courts shall have original jurisdiction, exclusive of the courts of the States, of all matters and proceedings in bankruptcy."

STATEMENT.

On March 2, 1960, the respondents, N. L. Wymard and George L. Stark, appellees below, were appointed receivers in bankruptcy of Kemmel & Co., Inc., a painting contractor, hereinafter referred to as "Kemmel", by order of the United States District Court for the Eastern District of Pennsylvania. Two months later the designated Referee in Bankruptcy issued a special order authorizing and directing the respondents to bring a plenary suit in the District Court for the recovery of compensation owing the bankrupt Kemmel for painting work performed by it for petitioner during the course of construction of a defense housing project at Fort George Meade, Maryland.

Accordingly, on June 6, 1960, respondents, in their capacity as receivers in bankruptcy, filed suit against the petitioner and in their complaint recited the following opening allegations appertaining to jurisdiction:

"1. N. L. WYMARD and GEORGE L. STARK were, by Order of this Court, dated March 2, 1960, appointed receivers of KEMMEL & CO., INC., Debtor Plaintiff in the above entitled matter and have duly qualified and are now acting in such capacity as receivers.

"2. On May 2, 1960 Plaintiffs obtained an Order of the Referee in Bankruptcy permitting them to sue the above named McCLOSKEY & CO., INC., Defendant, by reason of the facts more fully set forth herein."

On June 27, 1960, petitioner, duly represented by counsel, entered a general appearance in the action. Petitioner contemporaneously invoked the jurisdiction of the District Court by filing a motion to stay the proceedings in an effort to compel the submission of the matter to arbitration on the merits, which such motion is not now suggested and has never been held to have constituted anything other than an invocation and recognition of the jurisdiction of the Federal Court. See, Opinions of the Court of Appeals, 342 F. 2d, at pp. 498, 500 (Appendix to Petition, pp. A4, A9).

Upon dismissal of this motion by the District Court, 190 F. Supp. 420, and a sustaining of that dismissal by the Court of Appeals, 292 F. 2d 839, petitioner proceeded to the filing of an answer to the merits of respondents' complaint, and further filed a counterclaim against the bankrupt's estate demanding affirmative relief in the amount of some $249,804.29 upon an alleged loan claimed to have been owing by Kemmel.

Petitioner then filed a supplemental answer to the complaint, submitted pre-trial memoranda, attended a pre-trial conference, and on April 24, 1963, proceeded to a trial on the merits which extended over a period of four days, during which some 545 pages of testimony were taken, touching upon all claims and contentions of both litigants. On May 3, 1963, petitioner filed its second motion for a directed

verdict as to respondents' complaint and petitioner's own counterclaim, and on the same date, both petitioner and respondents filed their requests for findings of fact and conclusions of law.

Petitioner subsequently filed supplemental requests for findings of fact and conclusions of law, motions for directed verdicts, a motion for judgment and a motion for a new trial, each of which was denied by the District Court. On May 13, 1963, the District Court entered its judgment in favor of respondents in the amount of $271,346.37, and summarily dismissed petitioner's counterclaim. Petitioner then filed its appeal in the Court of Appeals for the Third Circuit, such appeal being directed wholly and exclusively to the merits.

At no point during the exhaustive proceedings prior to trial, or in the comprehensive trial of the cause and the counterclaim, the replete post-trial applications of petitioner or even in the appeal on the merits, did the petitioner question in any manner the jurisdiction of the District Court to have heard and disposed of either the suit or its countersuit. The first and only suggestion of a possible want of jurisdiction was raised by the Court of Appeals, *sua sponte*, at the time of the initial oral argument on the petitioner's appeal on the merits (April 7, 1964).

On June 18, 1964, the Court of Appeals thereupon entered an order vacating the judgment with leave to respondents to amend their pleading of jurisdiction in their complaint. Upon motion of the respondents, a rehearing was granted before the Court en banc, wherein the initial remand was superseded by a supplemental order directing the District Court to conduct additional proceedings with respect to the question of jurisdiction.

On October 8, 1964, the District Court thereupon concluded, *as a matter of fact*, that the petitioner, by virtue of its consistent acquiescence and positive participation in

the proceeding, its invocation of the jurisdiction of the Court to determine its right to arbitration and to try its counterclaim, had fully and completely consented to the jurisdiction of the District Court within the scope and meaning of §23(b).

On certification of this order and opinion to the Court of Appeals en banc, that Court affirmed this factual determination of the District Court, and further affirmed the decision of the District Court on the merits, after exclusion of that portion of the judgment representing overhead charges under the oral modification agreement.

ARGUMENT.

The primary legal and jurisdictional premises of the present case, and all precedent bankruptcy cases, sustained by the majority and concurring opinions of the Court below (Appendix to Petition, pp. A1-A9) are: (1) that §2(a)(7) of the Bankruptcy Act, 11 U. S. C. §11(a)(7), confers upon the District Courts of the United States exclusive original jurisdiction in bankruptcy matters; and (2) that §23(b), 11 U. S. C. §46(b), of the Act continues that jurisdiction in plenary suits brought by receivers and trustees in bankruptcy whenever the defendant manifests any form of consent thereto.

The Court below thereupon sustained the factual determination of the District Court that the above described acts of petitioner in the course of active participation in the four years of exhaustive litigation of this case—*as a matter of fact*, 234 F. Supp., at pp. 707-08—constituted a binding manifestation of such consent to jurisdiction under §23(b), *and*, of even greater moment, that petitioner had, for self-

serving reasons (in pursuing its counterclaim) affirmatively invoked the jurisdiction of that Court.

Confronting these essential findings of the Courts below, petitioner presents as its sole basis for granting of certiorari the issue whether this Court should, for the first time in the development of the law of bankruptcy jurisdiction, inquire into the subjective nature and quality of unequivocal acts of consent in jurisdiction otherwise manifestly within the scope of §23(b). Avoiding any considered reference to those unanimous controlling authorities that would otherwise compel the sustaining of the findings below, petitioner bases this unexampled issue solely upon the relevancy of a purported semantic similarity between consensual conduct in bankruptcy jurisdiction and the conditions under which a criminal accused may waive and forfeit his fundamental constitutional protections.

Petitioner therein and thereby most significantly no longer questions that §23(b) sustains the otherwise exclusive original jurisdiction vested within the District Court by §2(a)(7) whenever a bankrupt's defendant, by failing timely to withhold consent in a plenary suit brought in the Federal Court, forfeits his extraordinary option to deflect the controversy to a state tribunal. Nor does petitioner either deny that it did in fact perform each and all of those acts found by the District Court to have constituted such consent to its jurisdiction. Considering then petitioner's—(1) unqualified admission of its awareness of the full import of §23(b) (Petition, p. 12) when it performed such acts; (2) its singular avoidance of even allusory reference to the unexcepted line of Federal authorities, which have consistently determined the existence of consent under §23(b) as the result of the judicial acts of a litigant, without reference to their subjective quality; (3) the manifest concession of the total absence therein of any conflict among the various Courts of Appeals; (4) the implied concession

of an absolute want of any effect of the petition upon any other cause or litigant or upon any issue relating to the allocation of powers between the Federal Government and the states—the only basis remaining for the writ could be no more than a deigned compelling necessity for sanction of petitioner's unique analogy between substantive constitutional protections and a procedural privilege. The foregoing concessions and omissions, which were the essential premises of the statutory jurisdiction sustained below and which are indispensable premises of any syllogism proceeding from those statutes, are, as well, dispositive of petitioner's analogy.

I.

THE DECISION BELOW CORRECTLY FOLLOWED UNANIMOUS PRECEDENTS SUSTAINING INHERENT ORIGINAL FEDERAL JURISDICTION.

From the inception of our judicial system, Federal Courts have been granted an unexcepted and universal original jurisdiction over the estates and matters of bankrupts. This power, deriving from Article 3, Section 2 of the Constitution, is presently set forth in §1334 of the Judicial Code of 1948, which provides that:

> "The district courts shall have original jurisdiction, exclusive of the courts of the States, of all matters and proceedings in bankruptcy."

Having thereby the power to grant whole and exclusive jurisdiction over bankruptcy matters, plenary and summary, to the Federal Courts, *Schumacher v. Beeler,* 293 U. S. 367, 374, the Congress has explicitly provided for

the assumption of such jurisdiction in §2(a)(7) of the Bankruptcy Act, 11 U. S. C. §11(a)(7), which creates the Federal Courts as courts in bankruptcy and specifically invests them with the power to collect and hear all controversies relating to bankrupt estates ". . . except as herein otherwise provided." The qualification last noted was inserted by the Act of 1898, to append to the previously absolute exclusive jurisdiction of the Act of 1867 the contemporaneous initial provision of §23(b) which then and now further provides that:

> "Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have been brought or prosecuted them if proceedings under this title had not been instituted, *unless by consent of the defendant.* . . ." (Emphasis supplied.)

Thus, bankrupts' adversaries in 1898 acquired the unique option, wholly procedural in nature, *MacDonald v. Plymouth County Trust Co.*, 286 U. S. 263, 266-67, to secure a hearing in a State Court if they duly exercised the privilege not to consent to be sued in the Federal Courts, where all bankruptcy suits theretofore alone were required and permitted to be heard. Section 23(b), in limiting the theretofore unrestricted Federal jurisdiction over suits brought by bankruptcy receivers and trustees, contemporaneously granted and continued such jurisdiction subject to the condition that the defendant manifest its consent thereto. The congressional intent so embodied in §23(b) was interpreted and explained in the landmark decision of *Schumacher v. Beeler*, 293 U. S. 367, 374, wherein the Court stated:

> ". . . The Congress, by virtue of its constitutional authority over bankruptcies, could confer or withhold

> jurisdiction to entertain such suits and could prescribe the conditions upon which the federal courts should have jurisdiction. (Citation omitted.) Exercising that power, the Congress prescribed in §23b the condition of consent on the part of the defendant sued by the trustee. *Section 23b was thus in effect a grant of jurisdiction subject to that condition.*" (Emphasis supplied.)

Petitioner's essential position that such inherent jurisdiction in the event of consent ought to be operative only if that consent was by "conscious" "knowing" "choice" proceeds from the untenable presumption that it is the consent, initially, whatever its character, that creates the jurisdiction. The statutes which prescribe jurisdiction (acknowledged by petitioner only by characterization as "unprofitable" and "unhelpful"), however, clearly provide for a consent that is neither the engine nor a condition of jurisdiction but only an extraordinary procedural option to exercise a choice of one of two co-equal jurisdictional powers. Consent therefore being only a contingent limitation rather than a necessary condition of jurisdiction, *Williams v. Austrian*, 331 U. S. 642, it would go without citation of authority that even if unfettered "consciousness" or crystalline clarity of "choice" were a standard of its election of jurisdiction under §23(b), the petitioner's sustained invocation of the power of the Federal Courts in this case, extending over a period of four years to include every substantive and procedural device for relief available in any court, could but be construed as conduct sufficient to constitute the acceptance and acknowledgment under that section of the pre-existent jurisdiction of the Court.

Reference to the settled line of Federal authorities indeed so discloses that it has consistently been held that any explicit or tacit, affirmative or acquiescent act of a bankrupt's

defendant incompatible with an unequivocal denial of the jurisdictional power of a Federal bankruptcy court will constitute a binding consent to that power and a concommitant waiver of the right thereafter to elect instead the merely co-equal jurisdictional power of a State tribunal. See: that the mere entry of appearance is sufficient to constitute binding jurisdictional consent, *In re Read-York*, 152 F. 2d 313, 317 (7th Cir.), *Toledo Fence & Post Co. v. Lyons*, 290 Fed. 637, 640 646 (6th Cir.), *In re Berry*, 247 Fed. 700, 704 (S. D. Mich.), *Detroit Trust Co. v. Pontiac Sav. Bank*, 196 Fed. 29, 32 (6th Cir.), and *McEldowney v. Card*, 193 Fed. 475 (E. D. Tenn.); that answer to the merits will alone suffice, *May v. Moss*, 194 F. 2d 133, 137 (8th Cir.), *In re Read-York*, supra, *Seegmiller v. Day*, 249 Fed. 177 (7th Cir.), *In re Berry*, supra, *Toledo Fence & Post Co. v. Lyons*, supra, *Detroit Trust Co. v. Pontiac Sav. Bank*, supra, *McEldowney v. Card*, supra; particularly, that the seeking of affirmative cross relief by the filing of a counterclaim is separably an irrevocable consent, *May v. Moss*, supra, *In re Read-York*, supra; and, that *any* participation in a proceeding in Federal Court, even in the absence of any suggestion of any basis for its inherent bankruptcy jurisdiction, is a binding tacit act of consent, *Schumacher v. Beeler*, 293 U. S. 367 (where there was no pleading or notice of any nature of the jurisdictional basis), *Williams v. Austrian*, 331 U. S. 642, and *Harris v. Standard Acc. & Ins. Co.*, 297 F. 2d 627, 629-30 (2nd Cir), cert. den., 369 U. S. 843.[1] For the courts otherwise to have interpreted a de-

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[1] That exercise of the option of §23(b) is binding without regard to the quality of apprehension thereof by a bankrupt's defendant is strikingly settled in the recent decision in **Harris v. Standard Acc. & Ins. Co.**, where, under pleadings even less embodying reference to the presence of rights under the Bankruptcy Act (there being an averment by the trustees only of their appointment) it was most recently and again determined that tacit conduct constituted irrevocable consent. The Court there observed:

fendant's acts of acquiescence in and invocation of jurisdiction under §23(b) would, of course, result in the dilemma unanswered by petitioner that a procedural option would become a unilateral right vested solely in it alone to void a concededly correct judgment of a competent forum whenever disappointment in factual determinations followed that consent.

"The record does not disclose facts upon which diversity jurisdiction could rest. The complaint alleges only that the plaintiff-trustee in bankruptcy is a citizen of New York, that the defendant Standard is incorporated in Michigan, and that more than $10,000 is in controversy. **The district court did not discuss jurisdiction nor did the parties' briefs on this appeal.** According to the Bankruptcy Act, §23, 11 U. S. C. A. §46, the citizenship of the bankrupt and not that of the trustee is relevant in determining diversity. Moreover, under 28 U. S. C. §1332(c) which applies to suits commenced after July 25, 1958, a corporation is deemed a citizen of the state wherein is located its principal place of business. Although this action was filed on October 15, 1958, there is no allegation as to Standard's principal place of business. Therefore, the facts necessary to diversity jurisdiction both as to the bankrupts and Standard are lacking. Nevertheless, the district court had jurisdiction on another basis. The Bankruptcy Act, §23, sub. b, 11 U. S. C. A. §46, sub. b, gives federal courts jurisdiction over all suits brought by a trustee in bankruptcy if the defendant consents. See Schumacker (sic) v. Beeler, 293 U. S. 367, 55 S. Ct. 230, 79 L. Ed. 433 (1934). **The courts have held that a defendant consents if he argues the merits without objection to jurisdiction."** 297 F. 2d, at pp. 629-30. (Emphasis supplied.) (Citations omitted.)

Even were this summarization of the relevant decisions not dispositive of petitioner's inference of applicability of Rule 8(a) of the Federal Rules of Civil Procedure in support of its novel theory (Petition, pp. 5 and 12), it would remain that the instant complaint exceeded that of the **Harris** pleading by further averring that suit was brought upon express order of the Referee in Bankruptcy (Para. 2 of complaint). Petitioner has not only avoided acknowledgment that Rule 8(a) and its identical predecessor, Equity Rule 25, have been effective during the development of all adverse authority and that the pleadings in none of the precedents ever gave notice to a defendant that §23(a) would be relied upon, but avoids any response to the therefore inevitable conclusion below that petitioner's more extensive pleading clearly ". . . asserted facts enough to disclose . . . jurisdiction . . . under the Bankruptcy Act." 342 F. 2d, at p. 498 (Appendix to Petition, p. A5). See also, 342 F. 2d, at p. 497 (Appendix to Petition, p. A3).

That such anomaly would result from consideration of any impairment of its "consciousness" of the exercise of its §23(b) option, perceived of necessity only after final judgment of a Federal Court, was regarded dispositive of petitioner's argument by Freedman, J., of the Court of Appeals, in the concurring opinion joined by all members of the majority, when it was observed:

> "[Petitioner's theory] would approve the anomalous result that at this stage of a case such as this a plaintiff would be at the mercy of the defendant. For whenever, as here, the defendant had lost on the merits, he would decline to give express consent and thus defeat the judgment against him, yet if he had won, he could express consent and thereby ratify the judgment." 342 F. 2d, at p. 500 (Appendix to Petition, p. A9).

By reason of this inescapable consequence of petitioner's argument, it has been specifically further held in all the cases involving summary jurisdiction in Chapter XI proceedings that failure to interpose prompt unequivocal objection at the very outset of a summary hearing is an irrevocable waiver of objection to summary jurisdiction. See, *Moonblatt v. Kosmin*, 139 F. 2d 412 (3d Cir.), *In re Petroleum Conversion Corp.*, 99 F. Supp. 899 (D. Del.), aff'd per cur., 196 F. 2d 728 (3d Cir.), cert. den. sub. nom. *Vaughan v. Petroleum Conversion Corp.*, 344 U. S. 917, *Foodtown of Oyster Bay v. Dilbert's Leasing & Dev. Corp.*, 334 F. 2d 768 (2d Cir.). See, House Report No. 2320, 82d Cong., 2d Sess. (1952). That any lesser result could obtain to election of forum in a plenary suit goes as well without answer by petitioner.

Conceding both its awareness and chargeability and the unquestioned applicability of the statutes creating both the

exclusive jurisdiction and the privilege of avoiding it, petitioner is now asking this Court no less than to treat bankruptcy jursdiction as a subjective and antecedent personal choice of an unsuccessful defendant rather than as a vested power sustaining upon any submission to or solicitation of its exercise. That such a result cannot obtain is manifest upon the face of those statutes, is made certain by their unanimous interpretation in all relevant precedent, and is logically inescapable if the inherent jurisdictional power over which petitioner had but an option of preference is to have any meaning. As the majority below so aptly concluded (Appendix to Petition, p. A5), 342 F. 2d, at p. 498:

> "... The [petitioner] has availed itself of the opportunity to present its case, both defense and counterclaim, in the federal forum and the matter has proceeded to final judgment. Certainly, a judgment for the defendant, on claim or counterclaim, would have been binding upon the plaintiff. It would serve no worthwhile purpose to permit the unsuccessful defendant now to avoid the outcome of this fully litigated case."

II.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW.

The thrust of the instant petition would suggest an important question of federal law is at stake, equivalent in stature to the jealous preservation by the Court of immutable safeguards and guarantees afforded to accused individuals by our Constitution. We have herein noted that all of the authorities cited by petitioner concern themselves

wholly with the ultimate protection of the accused in criminal and quasi-criminal cases by this Court after one or more of such safeguards had been so abridged or abrogated as to cause irrevocable substantive prejudice.[2]

In placing its reliance solely upon such "waiver" decisions, petitioner seeks to equate the standards of denial of guarantees of due process with the procedural appendage of a privilege exercisable under §23(b) for no more than the "greater convenience of [non-diverse trustees' defendants and their] witnesses". *Schumacher v. Beeler*, 293 U. S. 367, 374. Any such attempted correlation of the guarantees of life and liberty must fail for disparity of context. Each and all of the authorities relied upon by petitioner do in fact hold, as by their context they must, that waiver of inviolable guarantees can only be by the in-

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[2] The waivers of constitutional right considered by the authorities relied upon by petitioner, in the order of their citation, concerned: denial of the right of counsel—even when expressly invoked, **Johnson v. Zerbst**, 304 U. S. 458; for an "inexperienced youth," **Uveges v. Pennsylvania**, 335 U. S. 437; a youth of only six years' schooling, **Herman v. Claudy**, 350 U. S. 116; an insane 17-year old, **Moore v. Michigan**, 355 U. S. 155; an illiterate child molester convicted upon unobjected impeachable testimony, **Carnley v. Cochran**, 369 U. S. 506; and for a defendant convicted upon incompetent and hearsay evidence in a trial corroded by extensive additional prejudice, **Gibbs v. Burke**, 337 U. S. 773.

The abridgement of the proscription against self-incrimination, **Emspak v. United States**, 349 U. S. 190; **Quinn v. United States**, 349 U. S. 155.

The admission of involuntary confessions, **Blackburn v. Alabama**, 361 U. S. 199, and, the bar against double jeopardy, **Green v. United States**, 355 U. S. 184.

The three further cases cited, although not involving primary emphasis on proscriptions on the prosecutionary power, are similarly disparate: **Fay v. Noia**, 372 U. S. 391, involving the requisite of exhaustion of state court review of an admittedly coerced confession; **Labor Board v. Lion Oil Co.**, 352 U. S. 282, involving a "waiver" of the right of strike after termination of a labor contract; and, **St. Regis Paper Co. v. United States**, 368 U. S. 208, involving proscription of anti-trust investigatory powers of the F. T. C. under §9 of the Census Act.

telligent, unfettered, conscious and knowing act of a citizen afforded their protection. The civil defendant in bankruptcy, however, has not an inviolate right of selection of his forum, but only a procedural privilege that however exercised will and can in no way affect or touch upon his substantive rights, his liberties or properties. There is no conceivable similarity between substantive standards protecting unrepresented, uneducated, incompetent and impoverished criminal defendants, or harassed groups of workmen denied their collective rights, or business concerns subject to manifest abuse of investigatory sanctions, and the withholding of a hindsight choice of civil forums from a defendant represented by a battery of able, experienced counsel now sought to be made by reason of a defect of "conscious" appreciation of the possible adverse results on the merits.

Petitioner must but concede, therefore, that whatever its initial "awareness" of the full application or "conscious" appreciation of the import of §23(b), it had in fact available to it and exercised every conceivable means of hearing and review open to any civil litigant, including the litigation of its counterclaim, in the District Court. At no point does petitioner complain that any substantive right obtaining to it in the Federal Court in reaching an acknowledgedly proper judgment was denied or in any way rendered of lesser quality than any similar right which could have obtained in a State Court; there is no contention that prejudice of petitioner's rights followed from its insular confusion in choosing to proceed in a Federal Court. The only possible unfavorable consequence of petitioner's exhaustion of the whole spectrum of its substantive and adjective rights in the District Court was no more or less than that after the due adjudication of its defenses and counterclaim a disappointing judgment was entered against it.

We fail to perceive, then, any important Federal ques-

tion applicable to the case at hand, raised by the theory of the petition or the constitutional authorities cited therein. It is appropriate that rather than having "disregard[ed] a general legal principle that this Court has consistently . . . applied" (Petition, p. 13), the Courts below, as this very Court has done in all comparable cases, have only applied the procedural law of bankruptcy to petitioner, as with other bankruptcy litigants, and have left substantive constitutional prescriptions to their guaranteed.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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